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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 894

MOSE REED,

Petitioner,

versus

MV FOYLEBANK, her engines, tackle, apparel, and furniture, and BANK LINES LIMITED, and STRACHAN SHIPPING COMPANY,

Defendants.

PETITION FOR REHEARING ON PETITION FOR CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT PURSUANT TO RULE 58 OF THE SUPREME COURT

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Jurisdiction

The jurisdiction of this Court was invoked pursuant to Title 28, Section 1254(1) United States Code. The Petition for Certiorari was docketed in this Court on November 28, 1969. Certiorari was denied on February 24, 1970. This Petition for Rehearing is permitted by Rule 58, Supreme Court Rules.

Intervening Circumstances
Supporting Petition for Rehearing

One of the two questions presented by the instant Petition for Certiorari was stated as follows:

> "(2) Has the defense of operational negligence as a defense to an action based on unseaworthiness been eliminated by the decisions of this Court in *Waldron v. Moore-McCormack*, 386 U.S. 724 and *Mascuilli v. United States*, 387 U.S. 237?"

This question was raised by the Trial Court's Finding of Fact No. 15 as follows:

> "15. The plaintiff Mose Reed is not entitled to judgment as he has not proved the vessel was in any way unseaworthy. The improper method of handling the crates is operational negligence for which no recovery can be allowed under the law against the vessel owner."

and the opinion of the United States Court of Appeals for the Fifth Circuit in *Reed v. M/V Foylebank* (5 Cir.) 415 F.2d 838 at 840 as follows:

> "The second issue is whether the operational negligence, i.e. improper loading plan, of Stevedore and appellant is synonymous with unseaworthiness. If so, operational negligence as a defense to unseaworthiness would be abolished. Moreover, any operational negligence would instantaneously render a vessel unseaworthy even though all the equipment and

appurtenances aboard the ship were admittedly seaworthy. This question is decided against appellant in this Circuit. *Grigsby v. Coastal Marine Service of Texas, Inc.* 5 Cir. 1969, ____ F.2d ____ [No. 22451, May, 1, 1969], Part VI, pp. 43-45 of slip opinion; *Luckenbach Overseas Corporation and Isthmian Lines, Inc. v. Usner,* 5 Cir. 1969, ____ F.2d ____ [No. 25344, July 3, 1969] pp. 3-4; and *Duncan v. Transeastern Shipping Corporation,* 5 Cir. 1969, ____ F.2d ____ [No. 26672, July 17, 1969] pp.2-3.[7]

"[7]Prior to our recent holdings in this area, there was considerable doubt as to the distinction, if any between 'operational negligence' and unseaworthiness. This, of course, raised doubt as to 'operational negligence' as a defense for unseaworthiness. The doubt was caused by the per curiam opinion of the Supreme Court in *Mascuilli v. United States*, 387 U.S. 237, 87 S.Ct. 1705, 18 L.Ed.2d 743 (1967). The cryptic citation of *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423, 79 S.Ct. 445, 3 L.Ed.2d 413 (1959) and *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944), in the Court's reversal of *Mascuilli* was the main reliance of appellant's counsel on this appeal. This reliance has now proved misplaced. See *Grigsby*, supra, *Luckenbach*, supra, and *Duncan*, supra."

Certiorari on the question of "operational negligence" as affected by *Mascuilli v. United States*, 387 U.S. 237 was denied by this court on February 24, 1970.

On February 27, 1970, three days later, this Court Granted certiorari in *Joseph Charles Usner v. Luckenbach Overseas Corporation*, No. 675 October Term, 1969 wherein the certified questions were as follows:

> "(1) Did *Mascuilli v. United States*, 387 U.S. 237, 87 S.Ct. 1705 abolish the defense of operational negligence in an action based on unseaworthiness?
>
> (2) Does operational negligence at the moment of injury render the vessel unseaworthy?
>
> (3) Has the Supreme Court rejected the distinction between operational negligence and unseaworthiness?"

Should this Court answer any or all three of the certified questions in *Usner* in the affirmative, Petitioner herein may win his lawsuit instead of losing it, if, but only if, his lawsuit is alive when the decision of this Court in *Usner v. Luckenbach* is rendered. Petitioner has argued the position that operational negligence was unseaworthiness consistently through Trial Court, Court of Appeal, and this Court by Petition for Certiorari beginning with the trial of this matter on July 25 and 26, 1966. Indeed, the *Reed* and the *Usner* cases have moved through the appellate levels of the Federal Courts almost side by side to such a degree that certiorari was denied in one and granted in the other within three days.

Petitioner respectfully represents that the grant of certiorari in *Usner v. Luckenbach,* No. 675 subsequent to the denial of certiorari in the instant Petition is both an intervening circumstance of substantial effect and other substantial grounds available to petitioner although not previously presented as contemplated in Rule 58(2), Supreme Court Rules. Both Petitioners are longshoremen injured by the operational negligence of their stevedore-employer in the Port of New Orleans. The cases involve the same legal question appropriately raised by the facts and the decisions of the Courts below. Both Petitioners certified the same questions to this Court. Subsequent to the denial of certiorari in the instant Petition, but within the time permitted for Petition for Rehearing, this Court granted certiorari in *Usner v. Luckenbach.*

Petitioner respectfully submits to this Court that it would be inappropriate to grant a hearing before this Court on a controlling question of law and deny a similar hearing to a party petitioning for hearing at the same time on the same point of law. Particularly is this so when the effect of the denial of the petition effectively forecloses the rights of the party denied the hearing regardless of the eventual decision on the legal issue.

Surely no inequity will result if Mose Reed is given a hearing on a question subsequently certified by this Court. Surely no inequity will result if the final mandate of this Court on the instant Petition is withheld pending the ruling in *Usner v. Luckenbach.* However, a considerable inequity may result if, eight years

after his serious injury, but after his rights are foreclosed beyond recall, Mose Reed is told by this Court in *Usner v. Luckenbach* that he was right all along, but to no avail.

Respectfully submitted,

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John R. Martzell

CERTIFICATE OF COUNSEL IN COMPLIANCE WITH RULE 58, SUPREME COURT RULES

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is limited to the grounds specified in Rule 58(2), Supreme Court Rules.

John R. Martzell

PROOF OF SERVICE

I, John R. Martzell, attorney for the petitioner and a member of the bar of the Supreme Court of the United States, hereby certify that on this day, I have served copies of the foregoing application for writs on:

Mr. J. Dwight LeBlanc, Jr.
CHAFFE, McCALL, PHILLIPS, BURKE,
TOLER, HOPKINS & SARPY
1500 National Bank of Commerce Bldg.
New Orleans, Louisiana 70112

Mr. Stuart A. McClendon
520 Imperial Office Building
3301 N. Causeway Boulevard
Metairie, Louisiana 70002

by mailing a copy thereof, postage prepaid addressed to their respective offices, this ____ day of March, 1970.

_____

John R. Martzell